

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**S.B., Appellant**

**and**

**U.S. POSTAL SERVICE, PROCESSING &  
DISTRIBUTION CENTER, Philadelphia, PA,  
Employer**

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**Docket No. 11-2135  
Issued: May 1, 2012**

*Appearances:*

*Thomas R. Uliase, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 23, 2011 appellant, through his attorney, filed a timely appeal from a June 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has more than two percent permanent impairment to his right and left legs.

**FACTUAL HISTORY**

On January 31, 2000 appellant, then a 51-year-old mail handler, filed an occupational claim (Form CA-2) alleging that he sustained a back injury causally related to factors of his

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

federal employment.<sup>2</sup> OWCP accepted the claim for aggravation of preexisting lumbosacral disc herniation. Appellant continued to work in a limited-duty position.

In a report dated September 11, 2009, Dr. Arthur Becan, an orthopedic surgeon, provided a history and results on examination. He stated that manual muscle testing revealed hamstrings and quadriceps graded at 4+/5 and gastrocnemius at 4/5. Dr. Becan opined that appellant had a nine percent left leg impairment under Table 16-12 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition) for sensory deficit in the S1 nerve root (sciatic).<sup>3</sup> He also found a 9 percent left leg impairment for quadriceps motor deficit and 13 percent for “hamstrings/gastrocnemius (sciatic)” motor deficit. As to the right leg, Dr. Becan opined that appellant also had 9 percent for quadriceps motor deficit and 13 percent for hamstrings/gastrocnemius motor deficit. In addition, he opined that appellant had a five percent right arm impairment based on shoulder acromioclavicular arthropathy.

The case was referred to an OWCP medical adviser for evaluation. In a report dated February 10, 2010, the medical adviser found that Dr. Becan’s opinion was not consistent with application of the A.M.A. *Guides*. He stated that only sensory and motor deficits that are the result of spinal nerve injury could be considered.

By decision dated February 12, 2010, OWCP found appellant was not entitled to a schedule award.

Appellant requested a hearing before an OWCP hearing representative, which was held on June 16, 2010. In a report dated May 28, 2010, Dr. Becan stated that he disagreed with OWCP’s medical adviser as appellant sustained a permanent impairment.

In a decision dated July 30, 2010, the hearing representative remanded the case for further development. The hearing representative directed OWCP to refer the case to a medical adviser for a review of the medical evidence. In a report dated August 2, 2010, an OWCP medical adviser recommended referral to a second opinion physician.

OWCP prepared a statement of accepted facts and referred appellant and the medical records to Dr. Dowse Rustin, an orthopedic surgeon. In a report dated September 14, 2010, Dr. Rustin provided a history and results on examination. He noted that appellant ambulated without limp, had slightly positive straight leg raising bilaterally, appeared to have good motor strength in his lower extremities and adequate range of motion in his ankles, knees and hips. Dr. Rustin opined that under the fifth edition of the A.M.A. *Guides* appellant would have a 20 percent whole person impairment based on his spine impairment. In a supplemental report dated September 21, 2010, he stated that the sixth edition of the A.M.A. *Guides* was confusing and that he would not provide an opinion under the sixth edition.

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<sup>2</sup> Appellant also filed a traumatic injury claim (Form CA-1) on January 31, 2000 alleging a back injury on December 2, 1998. The employing establishment indicated that he had been working a limited-duty position since December 14, 1998.

<sup>3</sup> Dr. Becan stated in the report that this was an upper extremity impairment, but given the tables cited it appears he was referring to a lower extremity impairment.

In a report dated October 5, 2010, an OWCP medical adviser noted that peripheral nerve impairments based on spinal nerves must be calculated according to *The Guides* Newsletter of July/August 2009. The medical adviser identified the L5 and S1 nerve roots, and found a mild sensory impairment. Using *The Guides*, Newsletter's Table for lower extremity impairments based on spinal nerve impairments, the medical adviser found the default leg impairment was one percent bilaterally for mild sensory deficit in each nerve root. Applying an adjustment formula, the medical adviser found no adjustment from the default value was warranted. OWCP's medical adviser found that appellant had a two percent impairment in each leg based on mild sensory impairment.

By decision dated December 13, 2010, OWCP issued schedule awards for two percent impairment to each leg. The period of the awards was 11.52 weeks commencing September 14, 2010.

Appellant requested a hearing before an OWCP hearing representative, which was held on April 12, 2011. By decision dated June 21, 2011, the hearing representative affirmed the schedule award for a two percent permanent impairment to each leg.

### **LEGAL PRECEDENT**

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>4</sup> Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A. *Guides* as the uniform standard applicable to all claimants.<sup>5</sup>

OWCP procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.<sup>6</sup> For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.<sup>7</sup>

### **ANALYSIS**

In the present case, appellant submitted reports from Dr. Becan with respect to a permanent impairment. The accepted condition was an aggravation of preexisting lumbosacral

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<sup>4</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>5</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>6</sup> FECA Bulletin No. 09-03 (issued March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, Schedule Awards, Chapter 3.700 (January 2010).

<sup>7</sup> See *G.N.*, Docket No. 10-850 (issued November 12, 2010); see also Federal (FECA) Procedure Manual, *supra* note 6. The Newsletter is included as Exhibit 4.

disc herniation. It is well established that neither FECA nor its regulations provide for a schedule award for impairment to the back, spine or to the body as a whole. Furthermore, the back is specifically excluded from the definition of “organ” under FECA.<sup>8</sup> Dr. Becan provided an opinion as to a permanent impairment to the legs based on a peripheral nerve impairment using Table 16-12 for the sciatic and femoral nerves.<sup>9</sup>

OWCP procedures note that a leg impairment based on spinal nerve impairments must be calculated according to *The Guides Newsletter* July/August 2009, which provides a specific methodology for calculating the impairment. Dr. Becan did not refer to the newsletter, apply its methodology or provide any additional explanation on the issue. The Board notes that he found motor deficits based on manual muscle testing, without discussing the testing or its validity as required under the A.M.A., *Guides*.<sup>10</sup> The opinion of Dr. Becan is therefore of diminished probative value on the question of permanent impairment. With respect to an opinion as to a right arm impairment based on a right shoulder injury, the Board notes that OWCP has not accepted a right shoulder injury. Dr. Becan did not provide a rationalized medical opinion addressing how any right shoulder condition was employment related. A claimant is entitled to a schedule award only for permanent impairment causally related to the employment injury.<sup>11</sup> The evidence does not support a schedule award for the right arm.

OWCP referred appellant to Dr. Rustin for a second opinion examination. Although Dr. Rustin did not provide an opinion as to permanent impairment under the A.M.A., *Guides*, OWCP may refer the case to an OWCP medical adviser for an opinion as to the degree of permanent impairment based on the report of an examining physician.<sup>12</sup>

OWCP’s medical adviser provided an opinion as to the degree of employment-related permanent impairment to the legs in a report dated October 5, 2010. This is the only evidence of record applying the guidelines of *The Guides Newsletter* July/August 2009 the report of Dr. Rustin. Under the table provided in *The Guides Newsletter*, a mild sensory deficit Class of Diagnosis (CDX) 1 for the L5 and S1 nerve roots has a default (Grade C) impairment of one percent for each nerve. Adjustments to the default value may be made by determining grade modifiers for Functional History (GMFH) Table 16-6 and Clinical Studies (GMCS) Table 16-8, using the established formula (GMFH - CDX) + (GMCS - CDX).<sup>13</sup> The medical adviser

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<sup>8</sup> See *James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(20).

<sup>9</sup> A.M.A. *Guides* 534, Table 16-12.

<sup>10</sup> The A.M.A., *Guides* note that manual muscle testing remains somewhat subjective and requires full individual cooperation and concentration. To be valid, the results should be concordant with other observable pathologic signs and medical evidence, and if measurements are made by one examiner, they should be consistent on different occasions. A.M.A., *Guides* 533.

<sup>11</sup> *Rosa Whitfield Swain*, 38 ECAB 368 (1987).

<sup>12</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards*, Chapter 2.808.6(d) (January 2010); *id.*, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (January 2010).

<sup>13</sup> See A.M.A., *Guides* 521. There is no grade modifier adjustment for physical examination because, as the newsletter explains, the physical examination is the primary basis for placement in the table. See also A.M.A., *Guides* 515-16.

assigned a grade modifier of one (mild problem) for functional history and clinical studies, resulting in no adjustment for the default value.

The Board finds that the weight of the medical evidence rests with OWCP's medical adviser. As noted, it is the only medical opinion conforming to OWCP procedures with respect to rating permanent impairment. There is no probative evidence of record that establishes more than a two percent permanent impairment to each leg.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant's impairment was two percent for each leg, he is entitled to four percent of 288 weeks or 11.52 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.<sup>14</sup> In this case, OWCP's medical adviser concluded that the date of maximum medical improvement was the date of examination by Dr. Rustin. The award therefore properly runs for 11.52 weeks commencing on September 14, 2010.

On appeal, appellant's representative argued that Dr. Becan's opinion is sufficient to constitute the weight of the evidence or create a conflict with OWCP's medical adviser. For the reasons noted, Dr. Becan's report is of diminished probative value and not sufficient to represent the weight of medical opinion. Appellant can request an additional schedule award and submit probative medical evidence to OWCP on the issue at any time.

### **CONCLUSION**

The Board finds that appellant has two percent employment-related permanent impairment to each leg.

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<sup>14</sup> *Albert Valverde*, 36 ECAB 233, 237 (1984).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 21, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board